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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

NORTHWEST AGRICULTURAL COOPERATIVE ASSOCIATION, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Interstate Commerce Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 10, 1965.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, pp. 17–26) is reported at 350 F. 2d 252. The opinion of the United States District Court for the District of Oregon is reported at 234 F. Supp. 496.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1965. On November 5, 1965, Mr. Justice Douglas entered an order extending the time in which to petition for a writ of certiorari to and in-

cluding December 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 203(b)(5) of the Interstate Commerce Act, as amended, exempts from economic regulation "motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act * * *." The Agricultural Marketing Act defines a cooperative association as one dealing in "farm products, * * * farm supplies and/or farm business services." The question presented is whether the exemption in Section 203(b)(5) extends to for-hire transportation by a cooperative of non-farm related products for non-members of the cooperative, even though such non-farm transportation may be found to be "incidental to" farm transportation and "necessary to its effective performance."

STATUTES INVOLVED

Section 203(b)(5) of the Interstate Commerce Act, as amended (49 U.S.C. 303(b)(5)), provides:

> (b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined * * *.

The Agricultural Marketing Act (12 U.S.C. 1141j(a)) provides, in relevant part:

> (a) *"Cooperative association" defined.* As used in this subchapter, the term "cooperative association" means any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof as such producers or purchasers and conform * * * to the following * * *.
>
> * * * * *
>
> Third. That the association shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members. * * *

STATEMENT

Respondent, Northwest Agricultural Cooperative Association, Inc. (Northwest), is a non-profit corporation formed under the Idaho Cooperative Marketing Association Act for the purpose of enabling its members collectively and economically to transport their agricultural products to markets (R. 15, 33). Northwest, which is solely engaged in transportation activities, operates a fleet of long haul trucks for this purpose. 234 F. Supp. at 497.

On the return trips from market areas, Northwest transports farm supplies back to its members. The

volume of these farm supplies brought back from the market areas for members, however, does not equal the volume of farm products shipped to market areas. Consequently, Northwest has available empty space on its backhauls and it uses this space to engage in for-hire transportation of non-farm commodities for non-members. (App. *infra,* p. 18.) During the period from November 13, 1963, through March 19, 1964, Northwest received total revenues of $230,375 for transportation services, out of which approximately $41,000, or about 16% of the total, was derived from the transportation for non-members of non-farm commodities (R. 35; App. *infra,* p. 18). For example, Northwest transported for non-members furnaces, air conditioners and water heaters from California to Idaho (R. 73–74), machinery from Minnesota to Idaho (R. 75), hardware from New Jersey to Oregon (R. 77), wire springs from Illinois to Oregon (R. 79), yarn from Oregon to Idaho (R. 91), door hanger parts from New York to Oregon (R. 94–95), and roofing materials from California to Idaho (R. 96–98).

On June 3, 1964, the Interstate Commerce Commission brought suit (R. 1) in the United States District Court for the District of Oregon to enjoin Northwest from thus hauling general commodities for hire throughout the United States, for non-member merchants and manufacturers, without a certificate of public convenience and necessity as required by Section 203(c) of the Interstate Commerce Act (49 U.S.C. 303(c)). Northwest admitted the transportation of non-farm commodities for non-members but

defended on the ground that all of its transportation activities were exempt from regulation under the Interstate Commerce Act by Section 203(b)(5) of the Act (49 U.S.C. 303(b)(5)), which exempts from regulation "motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act * * *."

On October 5, 1964, the district court permanently enjoined Northwest from "transporting, by motor vehicle in interstate commerce on public highways for compensation, property other than that which is exempt from economic regulation under the Interstate Commerce Act, unless either (1) such transportation is directly beneficial or functionally related to the farming activities of defendant's members, or (2) there is in force and in effect, with respect to * * * [Northwest] a certificate or permit or other authorization issued by the Interstate Commerce Commission authorizing it to engage in such operations" (R. 144). The court found (234 F. Supp. at 498):

> * * * The difficulty with defendant's position is that it sanctions for-hire transportation in open competition with regulated common carriers without subjecting the Association's [Northwest's] fleet to regulation. Though Congress intended to exempt agricultural cooperatives from regulation under the Act in the transportation of their goods to market and their necessary supplies and services on return, I do not read the statute as granting these associations an exemption to enter the general transportation business. Undoubtedly, the Association's practice affords economies to its

members, but these are economies not intended to be conferred by the Act.

The court of appeals reversed. The court first held that, since the agricultural cooperative exemption of the Interstate Commerce Act broadly applies to "motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act," the limitation upon Northwest's transportation activities urged by the Commission "must be found in the definition of a cooperative association in the Agricultural Marketing Act." (App., *infra*, p. 21.) The court then held that "a cooperative does not lose its status by engaging in activities other than its primary statutory activity so long as they are incidental and necessary to its effective performance," and that "Northwest's transportation of non-farm products and supplies was incidental and necessary" to the effective performance of Northwest's farm service within this test (App., *infra*, pp. 21–22). In thus finding all of Northwest's transportation activities to be exempt, the court stressed that Northwest's transportation of non-farm products was limited to back hauls, was small in relationship to its overall transportation operations and that "it is not economically feasible to operate the trucks empty on return trips." (App., *infra*, p. 22).

REASONS FOR GRANTING THE WRIT

This case presents, for the first time, the question whether agricultural cooperatives as defined in the Agricultural Marketing Act (12 U.S.C. § 1141j) may engage in for-hire transportation of non-farm related

commodities for non-members free of economic regulation under the Interstate Commerce Act. The court of appeals has held that cooperatives may engage in such transportation without regulation when "incidental and necessary" to the transportation of farm commodities for members of the cooperative. The court found in this case that the use of empty trucks on return trips from market areas to transport non-farm commodities for non-members of the cooperative was such incidental and necessary transportation.[1]

In the view of the Interstate Commerce Commission, this decision of the court of appeals establishes an important and erroneous principle of law, in conflict with the Interstate Commerce Act and the Agricultural Marketing Act, by permitting extensive unregulated for-hire transportation of non-farm related commodities by cooperative associations in competition with regulated motor and rail carriers. The Commission believes that permitting a cooperative to derive a substantial part of its revenues (here 16%) from, for example, the long distance transportation for non-members of air conditioners and machinery, may significantly disrupt the scheme of regulation

[1] While the question here presented is one of first impression in the courts of appeals, the district court in *I.C.C.* v. *Nelson Cooperative Marketing Association*, 209 F. Supp. 697, 701 (W.D. Okla.), declared that "the transportation of canned goods from canneries to grocers and chain stores, of processed meats from packing houses to meat dealers, of cheese from brokers to distributors, and other transportation which is not necessary to farming activities of member farmers are activities in which even a bona fide cooperative association may not rightfully engage."

under the Interstate Commerce Act. The Department of Agriculture, on the other hand, is of the view that the decision of the court of appeals correctly permits farmer cooperatives to make efficient use of their transportation equipment, a result they believe to be dictated by the policies underlying the Agricultural Marketing Act and to be consistent with the language of that Act. In the view of the Department, the contrary result would substantially impede the operation of farm cooperatives engaged in transportation of farm products and supplies.

The Solicitor General has tentatively concluded, in agreement with the Interstate Commerce Commission, that the decision below erroneously accords too sweeping an exemption from regulation to the transportation activities of agricultural cooperatives. The question is not free from doubt, however, and final formulation of his views must await further analysis of the two statutes involved and a thorough investigation of their purposes and histories. Regardless of the correctness of the decision below, however, the Solicitor General believes that the questions raised by that decision are of considerable importance and appropriate for resolution by the Court, involving, as they do, an apparent collision between the policies of two federal regulatory statutes and a potential substantial economic impact upon regulated motor and rail carriers, on the one hand, and farmer cooperatives, on the other. The importance of the case is emphasized by the fact that the two agencies of government charged with primary responsibility for administering the two statutes hold directly opposing views of their proper accommodation.

For these reasons, the Solicitor General, on behalf of the Interstate Commerce Commission, urges the Court to grant the petition for certiorari. If the petition is granted, the Solicitor General will undertake, not only to formulate a final view on the merits of the litigation, but also to communicate to the Court the differing views, if any, of the agencies primarily involved.

1. Part II of the Interstate Commerce Act (49 U.S.C. 301, *et seq.*) prescribes comprehensive economic regulation of for-hire motor transportation in interstate commerce, particularly as to entry into such transportation and rates. Section 203(b) of the Act (49 U.S.C. 303(b)) exempts from such economic regulation "(5) motor vehicles controlled and operated by a cooperative as defined in the Agricultural Marketing Act * * *." Unlike the immediately prior exemption in subsection 4a of Section 203(b), which applies to "motor vehicles controlled and operated by any farmer *when used in the transportation of his agricultural (including horticultural) commodities and products thereof, or in the transportation of supplies for his farm* [emphasis added]," this cooperative exemption itself contains no explicit restriction on the commodities which may be carried within the exemption, but is applicable to vehicles so long as they are operated by a farmers cooperative association as defined in the Agricultural Marketing Act.

It is therefore common ground, as the court of appeals noted (App. *infra*, p. 21), that the scope of the exemption in Section 203(b)(5) is to be determined by the scope of the transportation activities authorized to be undertaken by a cooperative association under the Agricultural Marketing Act. The

relevant provision of that Act, Section 1141j(a) (12 U.S.C. 1141j(a)), provides that "the term 'cooperative association' means any association in which farmers act together in processing, preparing for market, handling and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services; *Provided, however,* That such associations are operated for the mutual benefit of the members thereof as such producers or purchasers and conform * * * to the following * * *. Third. That the association shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members. * * *"

2. It seems clear that Congress' purpose in providing this exemption was to aid cooperative associations in performing their agricultural functions by engaging in the transportation of farm related commodities without being dependent upon commercial carriers. Without departing from this premise, the court of appeals has nevertheless held that the "backhaul" transportation of non-farm related commodities by cooperatives is within the purpose of the exemption. The Department of Agriculture agrees. The Department believes that the policy and language of the Agricultural Marketing Act supports this result. In addition, both the court of appeals and the Department rely upon the alleged adverse economic consequences to the cooperatives if they were to be forced

to return from market with empty truck space. In this case, for example, the court of appeals found that "[i]f Northwest is denied this income [from backhauling non-farm related commodities for non-members], its cost of transporting farm products to market will exceed the cost of available common carriage, and Northwest will be forced to discontinue its trucking operation." (App. *infra*, p. 18.)

It would obviously be extremely difficult for Northwest to prove that the public convenience and necessity requires that it be certificated to transport general commodities throughout much of the United States. If the decision below were reversed therefore, it is a fair assumption that most agricultural cooperatives would be unable to obtain certificates to carry non-farm related commodities for non-members and that some adverse economic impact upon cooperatives engaging in transportation would result. In the Interstate Commerce Commission's view, however, Congress explicitly prohibited cooperatives from gaining revenue through the unregulated transportation of non-farm related materials in order to subsidize their agricultural operations. The Commission points to the fact that the Agricultural Marketing Act defines a cooperative association as one in which farmers act together in various ways with respect to "farm products * * * farm supplies, and farm business services." In addition, the third proviso to Section 1141j forbids such an association from dealing in "farm products, farm supplies, and farm business services" for non-members in an amount greater in value than the business done with or for its members.

The Commission argues on the basis of these explicit provisions that Congress clearly did not intend to permit a cooperative association to perform any wholly non-farm related transportation services for non-members as a means of obtaining revenue; that whatever revenues a cooperative obtains, from members as well as non-members, must come from farm related activities. This is especially so, in the Commission's view, when the transportation of non-farm related commodities would, as in this case, be performed without federal regulation in competition with carriers closely regulated under the Interstate Commerce Act.

The Commission has thus repeatedly held that "in order to come within the so-called agricultural cooperative exemption, such transportation whether performed for members or nonmembers, must be designed to benefit directly, or be functionally related to its members' activities as such producers and purchasers [of farm products, farm supplies and farm business services]. * * * Any other interpretation, if carried to its logical conclusion, would allow a cooperative to engage in the general business of for-hire transportation merely for the sake of the profits to be gained therefrom, contrary to the intentions and policies of Congress discussed above. * * *" *Machinery Haulers Association* v. *Agricultural Commodity Service,* 86 M.C.C. 5, 24–25. See also, *Agricultural Transportation Association of Texas—Investigation of Operations,* 96 M.C.C. 293; *Cache Valley Dairy Association—Investigation of Operations,* 96 M.C.C. 616, petitions for reconsideration pending. The Commission also supports its position by reference to this Court's treatment of a

parallel problem in *American Trucking Associations, Inc.* v. *United States,* 344 U.S. 298, 318 where the Court found that it was

> unable * * * to conclude that the economic danger to the agricultural truckers from [the Commission's leasing rules] constitutes a violation of § 203(b)(6) [exempting the carriage of agricultural and certain other commodities from regulation]. The mere fact that commercial carriers of agricultural products will hereafter be required to establish their charges on the basis of an empty return trip is not the same as bringing them within Commission jurisdiction generally. The exemption extends, by its own words, to carriage of agricultural products, and not to operations where the equipment is used to carry other property. Needless to say, the statute is not designed to allow farm truckers to compete with authorized and certificated motor carriers in the carriage of non-agricultural products or manufactured products for off-the-farm use, merely because they have exemption when carrying only agricultural products. We can therefore find nothing in it which implies protection of agricultural truckers' right to haul other property, even though from an economic standpoint that right is important to protect profit margins. Regulated truckers must also receive protection upon their restricted routes and limited carriage. * * *

3. Upon a preliminary examination of the merits, the Solicitor General is of the view that the Commission correctly contends that the farm cooperative exemption in the Interstate Commerce Act is limited to the transportation of farm related commodities. The

words of the Agricultural Marketing Act on their face do not authorize non-farm related transportation by such cooperatives, and this appears consistent with the apparent purpose of the Interstate Commerce Act to exempt only agricultural transportation. In all events, it seems clear that the decision below will have a significant potential impact upon the regulated carriage of goods for hire. We have found no complete data on the transportation activities of farm cooperative associations. What figures we have show that, on January 1, 1961, the 9,294 farm cooperatives of the United States owned or leased an estimated 33,000 trucks (power units) (Bowser, *Motortruck Operations of Farmer Cooperatives,* General Report 109, Farmer Cooperative Service, U.S.D.A., Feb. 1963). A study of 19 such cooperatives showed total expenditures for transportation in excess of $100,000,000 in 1962, including $12,411,364 for transportation in their own trucks.[2] At that time, 18 of these cooperatives had backhauls for 46,627 trips, or 21.8 percent of the 213,606 trips their 603 trucks made in 1962. Of these backhauls, it is true that almost 93 percent carried the cooperatives' own goods, and less than one percent seem to involve transportation not functionally related to farming. However, the report from which these figures are derived concludes that "Lack of backhaul tonnage is a limiting factor in cooperative truck operations" (Camp, *Motortruck Operating Costs of Farmer Cooperatives,* General Report No. 121, Farmer

[2] The total revenue earned by regulated motor carriers in 1962, according to estimates by the research staff of the Transportation Association of America, was more than eight billion dollars. (*Transportation Facts and Trends*, Second Edition, April 1965.)

Cooperative Service, U.S.D.A., June 1964). The decision below now holds out the clear prospect that cooperatives will, in the future, be able to obtain substantial backhaul tonnage by diverting traffic in nonfarm related commodities from regulated motor and rail carriers. Such cooperatives may charge unregulated rates for the purpose of deriving some contribution to the cost of round trip movements. Such rates will be as low as necessary to divert traffic from the regulated carriers which rely exclusively upon transportation revenues for their livelihood. The record in this case illustrates the range of commodities which is subject to such diversion.[8]

Finally, while the present case on its facts involves only the backhauling of non-farm-related commodities, the principle announced by the court of appeals might also be applied to other transportation of such commodities deemed "necessary and incidental" to the cooperatives' farm-related activities. As one example, a cooperative association which has trucks wholly idle at certain seasons of the year might, on the basis of this decision, employ them during those periods in for-hire transportation of the products of a near-

[8] This range is further illustrated in *Cache Valley Dairy Association—Investigation of Operations*, *supra*, in which a cooperative association during a fourteen month period had transported, *inter alia*, 33 truckloads of steel for Colorado Fuel & Iron Corp., 221 loads of roofing for Ruberoid Co., 131 loads of grocery store merchandise for American Food Stores, and one load of beer.

We note, on the other hand, that the adverse economic impact upon cooperatives of being deprived of back-hauls of nonfarm related commodities might, to some extent, be ameliorated by trip leasing of the cooperatives' trucks to regulated carriers for the back-haul movement. See 49 U.S.C. 304(f).

by manufacturing plant. In addition, even if the exception were limited to "backhauls," the possibility of forming cooperatives designed primarily to transport the products of farmers located at some distance from each other, or of forming a federation of cooperatives from different localities, could substantially reduce the effect of that limitation.

CONCLUSION

While the merits of the statutory question involved in this case are not wholly clear, the case seems, on any view of the merits, to be of substantial importance. The governmental agencies primarily involved take opposite views of the proper construction of the separate federal regulatory statutes involved, and the accommodation finally reached will have significant potential economic impact upon the regulated entities. For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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DECEMBER 1965.

APPENDIX

United States Court of Appeals for the Ninth Circuit

No. 19,700

NORTHWEST AGRICULTURAL COOPERATIVE ASSOCIATION, INC., A CORPORATION, APPELLANT

vs.

INTERSTATE COMMERCE COMMISSION, APPELLEE

[August 10, 1965]

Appeal From the United States District Court for the District of Oregon

Before: MADDEN, Judge of the Court of Claims, and HAMLEY and BROWNING, Circuit Judges

BROWNING, Circuit Judge:

The Northwest Agricultural Cooperative Association seeks review of an injunction prohibiting it from engaging in certain trucking operations without authorization by the Interstate Commerce Commission.[1]

The following facts were established by stipulation and by the uncontradicted affidavit of Northwest's president. Northwest is a cooperative composed exclusively of farmers. It was organized to transport the farm products of members to market at less than

[1] The district court's opinion is reported in 234 F. Supp. 496 (D. Or. 1964).

it would cost if each member arranged separate transportation. The volume of farm supplies brought back from the market areas for members does not equal the volume of farm products shipped to those areas. Consequently, Northwest back-hauls non-farm commodities. This is the traffic enjoined. In a four-month period this traffic produced $41,000 in revenues out of a total of $230,375. If Northwest is denied this income, its cost of transporting farm products to market will exceed the cost of available common carriage, and Northwest will be forced to discontinue its trucking operation.

Northwest contends that its trucking operation is exempted from Commission economic regulation by section 203(b)(5) of the Interstate Commerce Act (49 U.S.C.A. § 303(b)(5)), which excludes from such regulation "motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act. * * *"[2] We agree.

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[2] Sec. 203(b) of the Interstate Commerce Act (49 U.S.C.A. § 303(b)) reads in part as follows:

(b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (4a) motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural (including horticultural) commodities and products thereof, or in the transportation of supplies to his farm; or (5) *motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined;* or (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof),

I

Section 203(b)(5) was added to the Interstate Commerce Act by floor amendment. The legislative history consists of a brief discussion in the House.[3] The statements made during the short debate indicate that Congress intended to accomplish the result which the statutory language plainly states: that is, to exempt from economic regulation under the Interstate Commerce Act trucking operations conducted by organizations which satisfy the definition of a "cooperative association" in the Agricultural Marketing Act.[4]

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if such motor vehicles are not used in carrying any other property, or passengers, for compensation * * *. [Emphasis added.]

[3] 79 Cong. Rec. 1218–21 (1935).

[4] The pertinent provision of the Agricultural Marketing Act (12 U.S.C.A. § 1141j(a)) reads as follows:

(a) As used in this subchapter, the term "cooperative association" means any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof as such producers or purchasers and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; and

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members. All business transacted by any cooperative associa-

As Congressman Jones said in introducing the amendment which became section 203(b)(5) of the Interstate Commerce Act, "it would exempt cooperative associations [which] comply with the" Agricultural Marketing Act.[5] Nothing in the debate suggests that Congress intended to limit the type of commodity hauled or otherwise condition the exemption granted any organization which qualified as an Agricultural Marketing Act "cooperative association."

The absence of a commodity limitation in section 203(b)(5) is made conspicuous by the presence of such limitations in the exemption provisions which precede and follow section 203(b)(5). See note 2. The conclusion that this difference was deliberate is strengthened by the fact that the exemption provisions in section 203(b)(4a) and section 203(b)(5) were initially stated as clauses in a single sentence.[6]

Subsequent to the enactment of section 203(b)(5), bills were introduced in Congress at the request of the Commission to condition the section 203(b)(5) exemption upon the nature of the transportation activities involved.[7] Congress took no action on these proposals.[8]

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tion for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such association.

[5] 79 Cong. Rec. 12218 (1935).

[6] Motor vehicles controlled and operated by any farmer and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farms; or motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act * * * (79 Cong. Rec. 12218 (1935)).

[7] S. 677, 88th Cong., 1st Sess. (1963); H.R. 3770, 88th Cong., 1st Sess. (1963).

[8] 78th Annual Report of the Interstate Commerce Commission 76–77 (1964).

For these reasons we conclude that if Northwest's transportation activities are to be limited in the manner suggested by the Commission, the limitation cannot be based upon section 203(b)(5) of the Interstate Commerce Act, but must be found in the definition of a cooperative association in the Agricultural Marketing Act.

II

The Agricultural Marketing Act defines a cooperative association as "any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged" or "in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services." See note 4. Transporting farm products and farm supplies, which is Northwest's primary activity, falls within the statutory definition. Moreover, the parties agree that a cooperative does not lose its status by engaging in activities other than its primary statutory activity, so long as they are incidental to the primary activity and necessary to its effective performance.* This would appear to end the case,

*ICC v. Jamestown Farmers Union, 57 F. Supp. 749, 753 (D. Minn. 1944), *aff'd* 151 F. 2d 403 (8th Cir. 1945) ("But if the cooperative is predominantly engaged in one or more of the activities specified in the Agricultural Marketing Act, and if its business with nonmembers is in an amount not greater in value than the total amount of the business that it transacts with its own members, such association does not lose its fundamental character as a cooperative. In other words, if such activities are merely incidental to, and necessary for the effectuation of the cooperative's principal activities as embraced within the Act, the status of the cooperative remains unimpaired"); Machinery Haulers Ass'n v. Agricultural Commodity Serv., 86 M.C.C. 5, 24 (1961) ("Thus, transportation rendered by a farm-

since on the uncontradicted facts Northwest's transportation of non-farm products and supplies was incidental and necessary to its farm-related transportation both in character and in amount—incidental because limited to otherwise empty trucks returning from hauling member farm products to market, and producing a small return in proportion to Northwest's income from trucking farm products and farm supplies; necessary because it is not economically feasible to operate the trucks empty on return trips, and because the additional income obtained is no more than that required to render performance of the cooperative's primary farm transportation service financially practicable.

The Commission advances two arguments against this conclusion, the first based upon certain language of the Agricultural Marketing Act, the second upon material in the legislative history.

1. The Commission relies upon the provision in the Agricultural Marketing Act that a cooperative association "shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members." See note 4. The Commission contends that this express limitation necessarily implies a further limitation that a cooperative association may not deal at all in *non*-farm products, supplies, or business services.

The Commission's reading of the statutory language

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ers' cooperative, which transportation is essential to, and in furtherance of, the lawful purposes of the cooperative as defined in the Marketing Act, is entitled to the benefits of the partial exemption").

This is also the Secretary of Agriculture's administrative interpretation of the Act. 6 C.F.R. § 70.3.

is unjustifiably strict. Reading the word "farm" this narrowly would exclude even incidental and necessary non-farm business. The Commission overlooks the obvious purpose of the provision to require simply that the cooperative association conduct at least half of its business with members. By statutory definition, a cooperative association's business is that of dealing in "farm products, farm business services, and farm supplies." See note 4. Thus the phrase relied on by the Commission simply describes the primary business of any cooperative association. It should not be interpreted as excluding particular transactions which, though not directly farm-related, are an incidental and necessary part of the cooperative association's general business, any more than should the description of permissible cooperative association activities in the first sentence of the statutory definition.

The Commission argues that unless the transportation of non-farm products and supplies is absolutely prohibited, it cannot be limited at all. Farm business with non-members is limited to fifty per cent of a cooperative association's total business; but, argues the Commission, this limitation applies *only* to "farm" business, and therefore unless non-farm business is totally prohibited, the cooperative might engage in non-farm business with non-members without any limit at all. The argument rests on a faulty premise. A cooperative will retain its exemption only so long as it remains in essential character a "cooperative association" described in the statutory definition. Thus the activities in which it engages must be such that the cooperative can be fairly described as a farmer organization primarily engaged in marketing farm products for farmers, or purchasing, testing, or furnishing farm supplies or farm services for farmers; and operating for the benefit of the members of

the cooperative in their capacity as producers of farm products or purchasers of farm supplies or farm business services. A cooperative would not be of the character contemplated by the statute if its non-farm related business exceeded that which was necessary and incidental to its farm-related business, and in no conceivable circumstances could non-farm related business approach fifty per cent of the total and remain incidental and necessary to that which was farm-related.

We are satisfied that the language of the Agricultural Marketing Act does not support the limitation for which the Commission argues.

2. The legislative history upon which the Commission relies consists of statements by members of Congress that cooperative associations qualifying under the Agricultural Marketing Act should not be permitted to enter "any line of business," but "only those connected with farm operations"; that they should furnish business services "not for any others," but "for themselves";[10] and, more specifically, that they should not "go into the general trucking business."[11]

There is nothing in these or any other relevant legislative materials suggesting that Congress intended to impose an *absolute* prohibition upon transportation by an exempt cooperative association of commodities not intended for use in farm operations, without regard to whether such transportation was necessary and incidental to the performance of a primary activity of transporting farm products and supplies.

Northwest is not engaged in a "general trucking business." Its trucking operation, viewed as a whole, is a farm service performed jointly by Northwest's

[10] Transcript of Hearing, Committee on Banking & Currency, 74th Cong., 1st Sess., S. 1384, Part 2, pp. 63–64.

[11] 79 Cong. Rec. 12219 (1935).

members "for themselves." The return hauls enjoined are "connected with farm operations," for they are incidental and necessary to the effective performance of Northwest's farm service. This return haul transportation therefore did not deprive Northwest of its essential character as a "cooperative association" under the Agricultural Marketing Act. Since it retained this character it retained its right to exemption under section 203(b)(5) of the Interstate Commerce Act.[12]

III

The meaning which we ascribe to the term "cooperative association" accords with the general purpose of the Agricultural Marketing Act. The Act was intended to encourage the organization and operation of farm cooperatives;[13] its terms are to be liberally construed to effectuate that purpose.[14] It would defeat the purpose of the Act to construe the term "cooperative association" in such a way as to deny a cooperative the right to engage in incidental activities which, as

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[12] ICC v. Jamestown Farmers Union, 151 F. 2d 403, 404–405 (8th Cir. 1945), is in accord. Three to 14 per cent of the commodities transported on return hauls were sold to non-farmers. 151 F. 2d at 404.

[13] 12 U.S.C.A. § 1141(a) provides: "It is declared to be the policy of Congress to promote the effective merchandising of agricultural commodities * * * (3) by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies."

[14] ICC v. Jamestown Farmers Union, 151 F. 2d 403, 404 (8th Cir. 1945).

a practical matter, are necessary to the performance of an activity authorized by that Act.

The Agricultural Marketing Act was not drawn with the regulation of transportation in mind, and its terms cannot be given one meaning for that purpose and another for the Act's purpose of encouraging agricultural cooperatives. The construction which we give the term does not open the door to unrestricted competition by exempt cooperatives with regulated carriers. If a cooperative engages in transportation for hire which is not incidental and necessary to the performance of an activity permitted by the Agricultural Marketing Act, it will lose its status as a "cooperative association" and its transportation activities will be subject to economic regulation by the Commission under the Interstate Commeree Act.

If the reach of the Agricultural Marketing Act is to be narrowed to serve the policies underlying the Interstate Commerce Act at the expense of those upon which the Agricultural Marketing Act is based, the readjustment must be made by Congress. And Congress, it may be pertinent to note, has repeatedly rejected past efforts to induce it to alter the present balance.[15]

Reversed.

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[15] See generally, Linnenberg, 25 Law & Contemp. Prob. 189 (1960); Fulda, 11 Vand. L. Rev. 543 (1958); Fulda, 43 Va. L. Rev. 677 (1957). See notes 7 and 8, supra.

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In the Supreme Court
of the United States

OCTOBER TERM, 1965

No. 807

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

NORTHWEST AGRICULTURAL COOPERATIVE ASSOCIATION, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR NORTHWEST AGRICULTURAL ASSOCIATION, INC. IN OPPOSITION

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JURISDICTION

The judgment of the court of appeals was entered on August 10, 1965. No petition for rehearing was filed. An order was entered extending the time in which to petition for a writ of certiorari to and including December 8, 1965. The petition for a writ of certiorari was filed on

December 8, 1965. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a bona fide agricultural cooperative can engage in incidental nonfarm, nonmember business to the extent that is reasonably necessary to effect the statutory purposes of the Agricultural Marketing Act.

STATUTES INVOLVED

The relevant portions of the Agricultural Marketing Act provide as follows:

12 U.S.C. Section 1141(a):

> "(a) It is declared to be the policy of Congress to promote the effective merchandising of agricultural commodities in interstate and foreign commerce so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products—
>
> "(1) by minimizing speculation.
>
> "(2) by preventing inefficient and wasteful methods of distribution.
>
> "(3) by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies.

"(4) by aiding in preventing and controlling surpluses in any agricultural commodity, through orderly production and distribution, so as to maintain advantageous domestic markets and prevent such surpluses from causing undue and excessive fluctuations or depressions in prices for the commodity."

12 U.S.C. Section 1141j(a):

"(a) As used in this subchapter, the term 'cooperative association' means any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof as such producers or purchasers and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; and

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

"And in any case to the following:

"Third. That the association shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such busi-

ness transacted by it with or for members. All business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such assoeation."

The pertinent provision of the Interstate Commerce Act as amended provides:

49 U.S.C. Section 303(b)(5):

"(b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined."

ARGUMENT

Contrary to the statement contained in the petition for writ of certiorari, the question of whether an agricultural cooperative can deal in nonfarm goods for nonmembers has been presented to another court of appeals. In *ICC* v. *Jamestown Farmers U F Co-op T A* (C.C.A. 8, 1945), 151 F.2d 403, the court held that such activities as are incidental and reasonably necessary to the primary purposes of the cooperative are permissible. There are no court decisions to the contrary. The decision of the Court of Appeals for the Ninth Circuit

herein is in conformity with the *Jamestown* decision. Accordingly, there is no conflict of opinions between the courts.

As the Solicitor General points out in his petition, the only conflict involved here is the unwillingness of the Interstate Commerce Commission to accept the interpretation of the Agricultural Marketing Act made by the Eighth Circuit Court of Appeals in *Jamestown* and reiterated by the Ninth Circuit here.

The Commission first attempted to avoid the effect of *Jamestown* by seeking legislation amending Section 204 (a) of the Interstate Commerce Act to provide the regulatory powers it seeks to have the court impose (78th Annual Report of the Interstate Commerce Commission, p. 77). Congress has consistently refused to take action on such legislation.

It is agreed that Northwest Agricultural Cooperative Association, Inc., is a bona fide cooperative organized under the Idaho Cooperative Marketing Association Act for the use and benefit of its farmer members. Whether or not such an agricultural cooperative *should* be exempt from the certification provisions of the Interstate Commerce Act is a policy decision for the legislative branch. Proponents of the Commission's position have repeatedly failed in attempts to either eliminate or in any way modify the cooperative exemption in Section 203(b)(5) from the time that portion of the Act was first passed in 1935 through the last session of Congress (79th Congressional Record, p. 12218 (1935); 78th Annual Report of the Interstate Commerce Commission, p. 77). The

fact that this case involves a collision between *policies* of two agencies within the executive branch, as pointed out by the Solicitor General, does not justify the court's intervention to establish for the commission what it claims its regulatory powers to be. As the court of appeals observed:

> "If the reach of the Agricultural Marketing Act is to be narrowed to serve the policies underlying the Interstate Commerce Act at the expense of those upon which the Agricultural Marketing Act is based, the readjustment must be made by Congress. And Congress, it may be pertinent to note, has repeatedly rejected past efforts to induce it to alter the present balance." (Northwest Agricultural Cooperative Association, Inc. v. ICC (9 Cir, 1965) 350 F2d 252, 257)

The Solicitor General's main concern about the decision below, however, appears not to be that it raises a significant legal problem in need of resolution, but rather the potential economic impact the decision might have upon regulated carriers. This also is a matter more properly left to the policy-making discretion of the legislative branch. However, even assuming the possible economic result of the decision is a legitimate concern of the court, the figures cited by the Solicitor General belie the claim that the questioned activities of cooperatives could have much of a relative "impact" upon the activities of regulated carriers. According to the statistics cited on page 14 of the Petition, the revenue received by farmers from the backhaul activities of their cooperatives would constitute less than .0001 percent of the revenue of regulated carriers.

As found by both the trial court and the Court of Appeals, this revenue is essential to Northwest to effectuate the stated policy of the Agricultural Marketing Act by placing its farmer members on a basis of economic equality and preventing inefficient and wasteful methods of distribution. It does not seem likely that receipt of such revenue by the farmer members of Northwest Agricultural Cooperative Association, Inc., will disrupt the regulated-carrier industry.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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